Tenaga Nasional Bhd v Majlis Perbandaran Seberang Prai

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO S2-25-30 OF 1997
ABDUL WAHAB J
11 JUNE 2003

Local Government *— Rates — Annual value — Meaning of — Whether electricity is an article within the meaning of the exclusion proviso to the definition of annual value*

The Seberang Prai Power Station ('the Power Station') is owned by and built for the applicant for the sole purpose of generating electricity for sale. The Power Station is located on land owned by the applicant within the jurisdiction of the respondent, a local authority under the Local Government Act 1971 ('the Act'). The respondent was authorized under s 127 of the Act to impose rates upon the applicant. The parties agreed that pursuant to s 127, the State Authority has authorized the imposition of rates based upon the 'annual value' of the holding. The question in this case was whether electricity is an article within the meaning of the exclusion proviso (b)(i), (ii) and (iii) of the definition of annual value in the Act.

Held:

(1) The annual value is 'the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes', and excluding from the value of the holding, the enhanced value given to the holding from the presence of machinery used for the making of any article or part of an article, the altering, repairing, ornamenting or finishing of any article or adapting for sale of any article (see p 785F–G).

(2) The electricity generated by the applicant on the holding was not released at large as various forms of radiant and electrical energy in nature, but was confined along cables and delivered to consumers, large and small. It is an 'article' that is made by the applicant on the holding. The annual value of the power generation units that directly produce the product 'electricity', including steam engines, boilers and other motive power belonging to the power generation units are not to be included in the computation of annual value for the levy of rates (see p 787H–I).

(3) The annual value of the holding in this case would comprise a) the value of the land, and b) buildings (if any) thereon, which term i) includes any house, hut, shed or roofed enclosure, whether used for the purpose of human habitation or otherwise, and also any wall, fence, platform, underground tank, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage, swimming pool, bridge, railway lines, transmission

lines, cables, redifussion lines, overhead or underground pipelines, or any other structure, support or foundation; and ii) excludes machinery for the production of electricity, and the steam engines, boilers or other motive power belonging to such machinery (see p 789B–C).

[Bahasa Malaysia summary

Stesyen Janakuasa Seberang Prai ('Stesyen Janakuasa tersebut') dimiliki oleh dan dibina untuk pemohon bagi tujuan utama menjana elektrik untuk jualan. Stesyen Janakuasa tersebut terletak atas tanah yang dimiliki oleh pemohon dalam bidang kuasa responden, sebuah badan berkuasa tempatan di bawah Akta Kerajaan Tempatan 1971 ('Akta' tersebut'). Responden telah diberi kuasa di bawah s 127 Akta tersebut untuk mengenakan kadar ke atas pemohon. Pihak-pihak tersebut berrsetuju bahawa menurut s 127, Pihak Berkuasa Negeri telah diberi kuasa untuk mengenakan kadar berdasarkan 'annual value' pehangan tersebut. Persoalan dalam kes ini adalah sama ada bekalan elektrik tersebut adalah satu artikel dalam maksud pengecualian proviso (b)(i), (ii) dan (iii) tafsiran penilaian tahunan Akta tersebut.

Diputuskan:

(1) Penilaian tahunan adalah 'the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes', dan mengecualikan nilai pegangan tersebut, nilai yang ditambah terhadap pegangan tersebut daripada alat mesin yang wujud yang digunakan untuk membuat apa-apa artikel atau sebahagian daripada artikel tersebut, pengubahan, pembaikan, perhiasan atau penyiapan apa-apa artikel atau penyesuaian untuk jualan apa-apa jualan (lihat ms 785F–G).

(2) Bekalan elektrik yang diperolehi daripada pemohon atas pegangan tersebut tidak dilepaskan menyeluruh kerana pelbagai bentuk The electricity generated by the applicant on the holding was not released at large as various forms of radiant and electrical energy in nature, but was confined along cables and delivered to consumers, large and small. It is an 'article' that is made by the applicant on the holding. Penilaian tahunan unit-unit penjanaan kuasa yang secara langsung membekalkan produk 'electricity', termasuklah enjin-enjin wap, dandang-dandang dan kuasa penggerak lain yang dimiliki oleh unit-unit penjanaan kuasa tersebut tidak boleh termasuk dalam pengiraan nilai untuk kadar levi (lihat ms 787H–I).

(3) Nilai tahunan pegangan dalam kes ini mengandungi: a) nilai tanah tersebut, dan b) bangunan-bangunan (jika ada) atasnya, di

mana i) termasuklah apa-apa rumah, pondok, tempat lindungan atau tempat beratap, sama ada digunakan bagi tujuan penetapan manusia atau sebaliknya, dan juga apa-apa dinding, pagar, platform, tangki bawah tanah, pentas, pintu berpagar, tiang, ceracak, paling, frame, papan iklan, slip, dok, dermaga, tambangan, jeti, landasan mendarat, kolam renang, jambatan, landasan keretapi, talian pemancar, kabel-kabel, talian 'redifussion', talian paip di atas dan di bawah tanah, atau apa-apa struktur lain, sokongan atau asas; dan ii) tidak termasuk alat mesin untuk menjana bekalan elektrik, dan enjin-enjin wap, dandang-dandang atau kuasa penggerak lain yang dimiliki oleh alat mesin tersebut (lihat ms 789B–C).

Notes

For cases on annual value rates, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 136–137.

Cases referred to

Council of the City of Newcastle v Royal Newcastle Hospital [1959] 100 CLR 1 (folld)

Longhurst v Guildford, Godalming and District Water Board [1961] 1 QB 408

Granada TV Network Ltd v Kerridge (Valuation Officer), Knight's Local Government and Magisterial Reports Vol LXI p 332, 1963 (folld)

Nanyang Manufacturing Co v The Collector of Land Revenue, Johore [1954] MLJ 69 (refd)

Hock Lim Estates Sdn Bhd v Collector of Land Revenue, Johore Bahru [1980] 1 MLJ 210 (refd)

Tiessen Trading Pte Ltd v Collector of Land Revenue [2001] 3 SLR 1 (refd)

The Chief Assessor, Singapore v National Shipbreakers Pte Ltd [1982] 1 MLJ 4 (refd)

Legislation referred to

Local Government Act 1971 ss 2, (b)(i), (ii), (iii), 127, 130

Electricity Supply (Amendment) Act 2001

Electricity Supply Act 1990

Factories and Machinery Act 1967 s 3

Goh Peng Hong (*Rajinder Singh* with him) *(Bakar & Partners)* for the applicant

Tan Sri Zaki Tun Azmi (*Karen Wilfred* with him) *(Rashid & Lee)* for the respondent

Abdul Wahab J:

1 The Seberang Prai Power Station ('power station') is owned by and built for the applicant Tenaga Nasional Bhd for the sole purpose of generating electricity for sale. The power station is located on land owned by the applicant within the jurisdiction of the respondent, Majlis Perbandaran Seberang Prai, a local authority under the Local Government Act 1971 ('the LGA'). The respondent is authorized under s 127 of the LGA to impose rates upon the applicant. Section 130 thereof places certain limits to the local authority's power.

2 Sections 127 and 130 of the LGA read as follows:

> 127 Power to impose rates.
>
> The local authority may, with the approval of the State Authority, from time to time as is deemed necessary, impose either separately or as a consolidated rate, the annual rate or rates within a local authority area for the purposes of this Act or for other purposes which it is the duty of the local authority to perform under any other written law.
>
> 130 Basis of assessment of rate.
>
> (1) Any rate or rates imposed under this Part may be assessed upon the annual value of holdings or upon the improved value of holdings as the State Authority may determine. [*Am Act A436*]
>
> (2) If any rate or rates are assessed upon the annual value of holdings such rate or rates shall not exceed —
>
> (a) thirty five per centum of the annual value in the case of the rates imposed under section 127;
>
> (b) (Deleted); [*Am Act A865*]
>
> (c) five per centum of the annual value in the case of the rates imposed under section 132.
>
> (3) If any rate or rates are assessed upon the improved value of holdings such rate or rates shall not exceed —
>
> (a) five per centum of the improved value in the case of rates imposed under section 127;
>
> (b) (Deleted); [*Act A865*]
>
> (c) one per centum of the improved value in the case of rates imposed under section 132.

3 The parties agree that pursuant to s 127, the State Authority has authorized the imposition of rates based upon the 'annual value' of the holding. The issue whether the respondent ought to use the improved value basis does not arise.

Definitions used

4 The rate or rates are assessed on the annual value of the holding. The term 'holding' is defined in the LGA as follows:

A 'Holding' means any land, *with or without buildings thereon*, which is held under a separate document of title and in the case of subdivided buildings, the common property and any parcel thereof and, in the case of Penang and Malacca, 'holding' includes messuages, buildings easements and hereditaments of any tenure, whether open or enclosed, whether built on or not, whether public or private, and whether maintained or not under statutory
B authority.

5 The annual value of the 'holding' means therefore the annual value of the land with or without buildings thereon.

6 The term 'annual value' is defined in the LGA as meaning the
C estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes:

Provided that —

D (a)

(b) in estimating the annual value of any holding in or upon which there is any machinery used for any or all of the following purposes —

(i) the making of any article or part of an article;

(ii) the altering, repairing, ornamenting or finishing of any article;
E

(iii) the adapting for sale of any article,

the enhanced value given to the holding from the presence of such machinery shall not be taken into consideration, and for the purposes of this paragraph 'machinery' includes steam engines, boilers or other motive power belonging
F to such machinery;

Annual value

7 The annual value is therefore 'the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the
G landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes', and excluding from the value of the holding 'the enhanced value given to the holding from the presence of' 'machinery used for the making of any article or part of an article, the altering, repairing, ornamenting or finishing of any article or adapting for sale of any article'.

H 8 Firstly, the proviso exempts machinery used for the making of any article or part of an article, the altering, repairing, ornamenting or finishing of any article or for the adapting for sale ('article production machinery') of any article. The enhanced value of the holding from the presence of 'article production machinery' is not taken into consideration for the calculation of rates. The fact of the exemption being made implies that except for the
I machinery being exempted, all other machinery are included into the value of the land and building, and to that extent regarded as part of the land or building as the case may be. This matter is dealt with in further detail below.

9 Secondly, it is noted that the definition introduces the concept of a hypothetical landlord renting out the land and buildings to a hypothetical tenant who makes use of the land and buildings. Rates are levied upon the landlord, unlike in England where it is levied upon the occupier. See Lord Denning in *Council of the City of Newcastle v Royal Newcastle Hospital* [1959] 100 CLR 1 in the Privy Council. Therefore it is the value of the holdings of the hypothetical landlord, and not of the hypothetical tenant, that is considered for the assessment of rate or rates. Recognition of this concept assists substantially in the application of the exclusions from rate determination.

10 Even if the landlord is also the occupier of the property, it is only his holding as the hypothetical landlord that is subject to levy of rate, since 'article production machinery' is exempted.

11 *Socfin Co Ltd v Chairman, Klang Town Council* [1964] MLJ 325, illustrates the concept of enhanced value. In that case the High Court held as follows at p 327:

> ... The tanks undoubtedly enhance the value of the holding, and they are not machinery used for industrial purposes which "shall not be taken into consideration" under section 2 of the Town Boards Enactment ...
>
> ...
>
> The sea-front along Port Swettenham, as a port, is lined with a considerable number of ware-houses or go-downs, constructed of corrugated iron sheets and other building materials. If these structures, used for storage of dry goods, are rateable for the enhanced value they gave to the holdings, I can see no distinction which would make a silo for grain not rateable, or a tank constructed for storage of liquids. The utilitarian value of a warehouse, silo or tank necessarily enhances the value of a holding. ...

Electricity

12 The only product of the applicant's activities in the Power Station is to produce electricity, which is transmitted through electrical cables and transformers of its transmission facilities to the public consumers.

13 The question in this case that arises from the definition of 'annual value' is whether electricity is an article within the meaning of the exclusion proviso (b)(i), (b)(ii) and (b)(iii) in the LGA. If it is, then the value of the power generation machinery is excluded from the determination of the annual value. If not, then it is rightly included by the respondent for the determination of the annual value.

14 It was submitted for the respondent that electricity is not an 'article' within the meaning of an 'article' in the definition of annual value. The submission is based on the argument that the Electricity Supply (Amendment) Act 2001 has amended the definition of 'electricity' in the Electricity Supply Act 1990 such that electricity is no longer defined as an article.

15 The Electricity Supply Act 1990 had previously defined electricity as an article as provided for under s 3 of the Factories and Machinery Act 1967. *Longhurst v Guildford, Godalming and District Water Board* [1961] 1 QB 4O8, at p 418 considered the meaning of 'article' generally, and did not specifically consider electricity. It involved equipment to pressurise water. It was held while filtered water is an article, pressurisation of water is not the production of an article. *Granada TV Network Ltd v Kerridge (Valuation Officer), Knight's Local Government and Magisterial Reports Vol LXI p 332, 1963* and cited by counsel, dealt with electrical impulses, in other words, signals, and not electricity as such. Granada TV Network Ltd was using considerable electricity and human labour to produce programs that were transmitted by a land based line to its television station from where it was transmitted to the public. Lord Denning in the Court of Appeal held that such electrical signals were not articles:

> It seems to me that electrical impulses which operate simply by means of vibrations, flowing in waves along this land line, thus transmitting a series of impulses to the other end, cannot be said, in any proper meaning of the word, to be an 'article'.

16 Returning to the Electricity Supply Act 1990, the need for the 2001 amendment would in my view support the reasoning that prior to the amendment, the understanding is that electricity is an article, and that is the meaning that was understood and intended when the LGA was enacted. The amendment cannot be intended to or, have the effect of amending the meaning in the LGA when it was enacted and as applicable on the relevant date in this case.

17 The sole use of the holding by the applicant is to generate, or in other words, to produce electricity, for sale. Electricity is a form of energy. It has no physical form to make it identifiable as an object or for that matter an article in the normal sense. But energy, or more specifically, electricity in this case, in the context of the business activity of the applicant, is nevertheless a product. In that sense as a product, electricity is in my view no less an article than say, air. In *Granada TV Network*, Lord Denning MR said at p 334:

> ... I can well see that water is an article, at any rate when it is confined in a pipe, but I doubt whether water is an article when it is flowing in a river. I can understand that gas is an article when it is confined in a container, but I should doubt whether gas escaping into a room was an article ... .

18 The electricity generated by the Applicant on the holding is not released at large as various forms of radiant and electrical energy in nature, but is confined along cables and delivered to consumers, large and small. In that sense it is in my view an 'article' that is made by the Applicant on the holding. The LGA eifter all is legislation dealing with local authorities and its use of the term 'article' is a wide and general description of the work activities on holdings within a authority's area and cannot be expected to provide an exhaustive and detailed description of each of all of the products of the diverse production activities found in this day and age.

Machinery and swiping

19 The respondent further submits that 'machinery' in proviso (b) of the definition refers to machinery that is not integrated with the land and/or building, but are on the land and enhances the value of the land. In support of this submission, it was submitted for the respondent that the plant and machinery in the Power Station come within the definition of 'building' and is part of the holding as defined. Section 2 of the LGA is as follows:

> 'building' includes any house, hut, shed or roofed enclosure, whether used for the purpose of human habitation or otherwise, and also any wall, fence, platform, underground tank, staging, gate, post, pillar, paling, frame, hoarding, ship, dock, wharf, pier, jetty, landing- stage, swimming pool, bridge, railway lines, transmission lines, cables, redifussion lines, overhead or underground pipelines, or any other structure, support or foundation;

20 One would note firstly that nothing in the proviso (b) to the definition of 'annual value' suggests directly that any machinery could be a 'building'. Even so, the definition of 'building' lists items that are in the nature of structure, support or foundation that are essentially immoveable, and consistent with the notion of structure, support or foundation that are either provided by a landlord to a tenant, or, even if put up by a tenant, is generally expected to be left behind by a tenant upon leaving.

21 As mentioned in para 8 above, the exemption only of 'article production machinery' and extension of the meaning of such machinery to steam engines, boilers or other motive power belonging to such machinery to be excluded from the computation of annual value, leads me to the conclusion that all other machinery are intended to be included in the meaning of land and buildings where they are attached to such land and buildings. The term 'other motive power' is wide enough to encompass other motive power relying on fuels, electricity, heat, or other sources of energy such as steam, wind, wave motion or flowing water. A steam driven turbine is clearly as much a steam engine as the old steam driven piston engine on say a steam engine locomotive. Thus if electricity is an article, then steam engines, boilers or other motive power belonging to the direct machinery for the production of electricity are also excluded. Thus the alternators that produce electricity, and the turbines or steam engines, boilers or other motive power to the alternators are exempted from the computation of annual value for the purpose of rates.

22 But the annual value of machinery and all other things so attached to the land or building other than 'article production machinery' and steam engines, boilers or other motive power belonging to the direct machinery for the production of electricity are rateable. This would include the annual value of all administration, guardhouse, recreational and other buildings, transmission facilities, fuel pipelines, tanks etc. It would also include all land, which term includes all things attached to the earth or permanently fastened to anything attached to the earth and not otherwise excluded.

23 The conclusion must be that the annual value of the power generation units that directly produce the product 'electricity', including steam engines, boilers and other motive power belonging to the power generation units are not to be included in the computation of annual value for the levy of rates.

24 For clarity, the annual value of the holding in this case would comprise a) the value of the land, and b) buildings (if any) thereon, which term i) includes any house, hut, shed or roofed enclosure, whether used for the purpose of human habitation or otherwise, and also any wall, fence, platform, underground tank, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage, swimming pool, bridge, railway lines, transmission lines, cables, redifussion lines, overhead or underground pipelines, or any other structure, support or foundation; and ii) excludes machinery for the production of electricity, and the steam engines, boilers or other motive power belonging to such machinery.

25 The cooling water and the boiler feed pumps are no doubt pieces of machinery. But their purpose is to pump cooling water and in the case of the latter, condensate in the de-areator storage tank into the boiler drum. The question is whether they are used in the making of any article or part of an article; the altering, repairing, ornamenting or finishing of any article; the adapting for sale of any article, to wit electricity. To my mind the definition of building provides a clear guide. In that definition, 'transmission lines, cables, rediffusion lines, overhead or underground pipelines' are included but transformers and pumps that steps up or down voltages for transmission etc, or pumps to pump liquids or gases through pipelines are not. I would, therefore, hold that pumps and transformers are not subject to valuation for the computation of annual value.

Determination of gross annual value

26 The foregoing dealt with the matter of which parts of the land and buildings at the Power Station are to be included or excluded in the determination of the annual value. Having determined that, the next question is what is in fact the annual value. For that we must return to the definition of annual value.

27 The term 'annual value' is defined in the LGA as meaning the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes.

28 How is this rent to be determined? The safest guide to determine fair market value is evidence of sales of the same or similar land in the neighbourhood: *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] MLJ 69; *Hock Lim Estates Sdn Bhd v Collector of Land Revenue, Johore Bahru* [1980] 1 MLJ 210 after making due allowances for all the circumstances (*Tiessen Trading Pte Ltd v Collector of Land Revenue* [2001] 3 SLR 1).

29 Though these cases relate to land values, the same principle applies in respect of rents. This provides the most direct and simplest solution. The method is generally described as the Comparison Method. Other methods are the Profits Method and the Contractor's Method.

30 In *Shell Malaysia Trading Sdn Bhd v Majlis Perbandaran Klang* [1988] 3 MLJ 418, the Contractor's Method was used in the absence of any sale or rentals of petrol stations in the locality. It was held:

(1) Taking all factors into account, the lands should be valued at $35 psf inclusive of site improvements.

(2) The court should accept the measurements given by the appellants' valuers and the construction costs bearing in mind the differences in the age of the buildings and making allowances for depreciation therefore.

(3) If a rate is based on percentage basis then it should be the same in all cases but the resultant actual returns will vary according to size, facilities and location of the station. In this case the capitalization rate for both properties should be 7% of the effective capital value.

31 In *The Chief Assessor, Singapore v National Shipbreakers Pte Ltd* [1982] 1 MLJ 4. it was held that where the property is of a kind that is rarely let from year to year, recourse is sometimes had to interest on the capital value, or on the actual cost, of land and building, as a guide to the ascertainment of the annual value, and that this method is commonly referred to as the contractor's test or contractor's basis.

32 The Singapore case set out a passage from Dawkins (Valuation Officer) v Royal Leamington Spa Corporation and Warwickshire County Council [1961] 8 RRC 241 at p 251 as follows:

> " The use of the contractor's basis, last resort or not, is amply supported by the authorities. In his opening the Solicitor-General pointed to its logic in words we cannot hope to improve upon: 'As I understand it, the argument is that the hypothetical tenant has an alternative to leasing the hereditament and paying rent for it; he can build a precisely similar building himself. He could borrow the money, on which he would have to pay interest; or use his own capital on which he would have to forgo interest to put up a similar building for his owner-occupation rather than rent it, and he will do that rather than pay what he would regard as an excessive rent — that is, a rent which is greater than the interest he forgoes by using his own capital to build the building himself. The argument is that he will therefore be unwilling to pay more as an annual rent for a hereditament than it would cost him m the way of annual interest on the capital sum necessary to build a similar hereditament. On the other hand, if the annual rent demanded is fixed marginally below what it would cost him in the way of annual interest on the capital sum necessary to build a similar hereditament, it will be in his interest to rent the hereditament rather than build it'.

33 The above must of course be read bearing in mind that in England the rate is levied upon the occupier.

34 Counsel for the respondent submitted that the comparison method is not appropriate because there are no comparables in the area, that is, there are no other power stations in Prai. Thus the comparison method was not used. Instead the Contractor's Method was used,

35 I would quite agree. The respondent, however, appears in this case to have estimated the cost of construction of the Power Station by estimating the replacement cost with reference to the YTL Paka Power Station. Now if the latter power station is an unsuitable comparable in the Comparison Method, it would be unsuitable for estimating the replacement costs given that power stations generally are purpose built. As pointed out in *Tiessen Trading Pte* there is a host of complex variables even in land valuation. The reference to YTL Paka Power Station was not confined to the land and buildings excluding the machinery specified in the definition of annual value as explained above. The error commences with the position taken by the respondent that the entire Power Station is included for the computation of rate.

36 The five stages in the Contractor's Method may be set out as follows:

> The first stage is the estimation of the cost of construction of the building.
>
> The second stage is to make deductions from the cost of construction to allow for age, obsolescence and any other factor necessary to arrive at the 'effective capital value'.
>
> The third stage is to estimate the cost of the land in accordance with the principle of '*rebus sic stand bus*'.
>
> The fourth stage is to apply the market rate or rates at which money can be borrowed or invested to the effective capital value of the building and the land. The result is what it would cost the occupier, in annual terms, to provide the hereditament for him, rather than to lease it.
>
> The fifth stage is to consider whether the result of the fourth stage really represents what the hypothetical tenant would pay for an annual tenancy on the statutory terms, and to make any adjustments necessary to ensure that no higher rent is fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises.

37 These steps should be applied to the value of land and buildings on the property, including all machinery and equipment so attached to the land or building as to be a part thereof (eg winch gantries, rails, poles, power transmission structures, etc), excluding all moveable equipment and machinery (eg transformers, pumps, welding equipment, repair tools, vehicles etc), steam turbines, alternators, boilers and other sources of motive power driving such machinery.

Order accordingly.

Reported by Peter Ling